IN THE

Supreme Court of the United States

October Term, 1973

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No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

On Appeal to the Supreme Court of the State of Georgia

BRIEF ON BEHALF OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC., THE INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., AND THE PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

NEWTON N. MINOW
One First National Plaza
Suite 4800
Chicago, Illinois 60670
(312) 329-5400

Attorney for the Amicus Curiae

Of Counsel:

DONALD A. MACKAY
LEE FELTMAN
MICHAEL A. BAMBERGER

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Interest of the Amicus Curiae

The Council for Periodical Distributors Associations, Inc. ("CPDA") is the national trade association for over 500 independent local wholesale distributors of comic books, magazines and paperback books.

The International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the twelve principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers for ultimate distribution to retailers and the public throughout the United States.

The Periodical and Book Association of America, Inc. ("PBAA") is an association of publishers of magazines and paperback books sharing a common interest in the sale of their products through independent distribution channels employing the members of IPDA and CPDA.

The members of IPDA and CPDA constitute the principal distribution channel for the mass market sale of comic books and magazines to retailers within the United States, including such retail outlets as newsstands, drug and food stores and bookstores. Their members are also a major distribution channel for the sale of paperback books through such retail outlets. During 1973 over 100,000 retail customers were supplied through these distribution channels with comic books, magazines and paperback books having an estimated retail sales value of two billion dollars. The members of IPDA and CPDA constitute the principal independent distribution channel for all of the nationally known magazines (e.g. Time, Readers Digest, Playboy, Family Circle, TV Guide) and the major paperback book lines (e.g. Dell, Bantam, Fawcett, Pocketbooks).

Historically the Amicus Curiae have been vitally interested in the legal problems associated with obscenity and have sponsored state legislation and filed amicus curiae

briefs before this Court in prior obscenity cases (e.g. *Redrup* v. *New York*, 386 U.S. 767 (1967)). This interest stems directly from the fact that they, and ultimately their retail customers, are the principal source for most of the magazines and paperback reading material sold to consumers at retail locations throughout the United States. They have a compelling business interest in what materials may lawfully be sold under state or local criminal laws.

This amicus curiae brief is filed pursuant to the order of this Court dated December 10, 1973 in this case and blanket consents which Amicus Curiae understand have been filed by the parties.

The Importance of This Case

In *Roth* v. *United States*, 354 U.S. 476 (1957), this Court established that the protection of the First Amendment extended to motion pictures and written materials dealing with sex and imposed standards with which state law must comply before published material could be barred as obscene. These standards were articulated in a series of decisions culminating in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), and *Redrup* v. *New York*, 386 U.S. 767 (1967). These decisions, as applied thereafter in subsequent "Redrupped" *per curiam* decisions of this Court, were interpreted by the bar and the publishing industry as sharply limiting the application of the obscenity laws to "hard core" pornography not produced by the legitimate publishing industry served by the Amicus Curiae.

In response to changing mores in the United States as reflected in the published material sought by the public, the publishing industry is currently publishing magazines and paperback books whose content, although not "hard core" in any traditionally understood sense of that term, is increasingly frank in the depiction and description of matters relating to sex.

The decision of this Court in *Miller* v. *California*, 413 U.S. 15 (1973) and the companion cases decided June 21, 1973, whether or not so intended by this Court, have been broadly interpreted by law enforcement officials, law making bodies and others as narrowing the First Amendment protection built upon *Roth* and upon which the existing system of national distribution of magazines and paperback books is based.

The instant case presents the first opportunity since *Miller* to examine the scope and effect of the revised three-prong test of obscenity announced in *Miller* and to consider the procedural safeguards necessary to prevent the chilling effects of local censorship under threat of criminal prosecution.

Already numerous instances of threats of criminal prosecution have resulted in the withdrawal of nationally known magazines from circulation in many cities throughout the United States. Most such incidents go unreported in the press and rarely result in reported judicial decisions.

The effectiveness of threatened criminal prosecution in imposing self-censorship follows directly from the nature of the mass magazine and paperback distribution system. The editorial content of magazines and paperback books is, of course, decided upon by their publishers. The books

or magazines are then shipped directly from the printing plant to CPDA member wholesalers pursuant to allocations set by IPDA members. The publications are received in bulk by the wholesalers who distribute them to their retail dealers, often within three or four days after delivery to meet scheduled "on sale" dates. At no stage does the wholesaler or retailer specifically order the periodicals that each sells or review or approve editorial content. Indeed, they cannot realistically do so. There are approximately 500 separate publishing houses in the United States, publishing a conservatively estimated 1400 national and regional magazines as well as issuing approximately 5000 new paperback releases annually. The sheer bulk of new titles effectively precludes review prior to sale at all levels of commercial distribution.

Under this system retailers and wholesalers alike are particularly vulnerable to coerced and self-imposed censorship. The materials typically are "on sale" before anyone has examined their content. All the ingredients supporting an arrest exist before any question has been raised about a particular issue.

In addition, an increasingly large portion of retail sales of all magazines and paperbacks takes place at drug and food store locations principally engaged in sales of products for family use. Understandably such retail outlets are concerned about their general reputation in the community and are reluctant to risk arrest.

Moreover, since two prongs of the legal test of obscenity—prurient appeal and offensiveness—are highly subjective, even examination of the materials would not readily disclose whether or not they might be deemed to be ob-

scene, particularly under the *Miller* local community standards test.

The interest of the Amicus Curiae is frankly commercial. Their members, particularly the wholesaler members of CPDA and their retail customers, operate locally and must deal directly with law enforcement and elected officials in their communities. The fact is that, at the local level, the content of magazines and paperbacks is judged largely outside any judicial forum. Ambiguity, uncertainty or the exercise of local discretion in determining what is obscene creates (and has already created under *Miller*) a climate within which self-censorship under threat of arrest takes over. This is the significant and operative level at which censorship decisions occur.

Because the *Miller* decision has been widely interpreted as narrowing the protection heretofore granted by this Court to published materials, the Amicus Curiae urge the Court to take this opportunity to confirm the limited area within which the obscenity laws may operate and make it clear that materials not within the traditionally "hard core" category are not subject to them.

Summary of Argument

1. Fairness and the requirements of due process demand a clear-cut and understandable test which distributors and booksellers can apply in determining whether particular magazines and paperbacks are obscene. To avoid the chilling effect of uncertainty as applied to materials dealing frankly with sexual matters, such as in "Carnal

Knowledge" in this case, the Court should reemphasize that *Miller* meant only that "hard core" pornography is obscene and that "hard core" pornography includes only actual and explicitly described and depicted ultimate sexual acts and not, *inter alia*, mere nudity, profanity or other sexually oriented content. Such a test, although certain materials within that category might be redeemed by a showing of serious purpose under other aspects of the *Miller* test, would establish an understandable and workable minimum criterion for distinguishing clearly lawful material. Only such clarity will enable sellers to resist the pressures for self-censorship.

2. However carefully and narrowly drawn by this Court, any test of obscenity inevitably will involve subjective judgments in determining whether or not particular material is within or without the ambit of constitutionally protected speech. Prosecutors and booksellers alike will be presented with the necessity of judging borderline materials. Under the existing practice of treating obscenity as a crime, booksellers are highly susceptible to official or unofficial suggestions that certain material should not be sold or displayed. Clearly, under the decisions of this Court, such determinations are a judicial function, but in practice the vast majority of censorship instances proceeds informally and non-judicially. The difficulty of applying the legal test of obscenity, as well as the fact that many book wholesalers and retailers cannot and do not review the vast flow of magazines and books they handle, renders criminal prosecution too crude a basis for regulating the subject matter of books and magazines and requires a mandatory prior civil determination of obscenity before criminal proceedings can be instituted.

3. The term local community standards should be clearly defined and should include a sufficiently large community to be fairly representative of a generally accepted viewpoint regarding prurient appeal and the offensiveness in the depiction of sexual matters. At a minimum such community should be statewide and, preferably, national. In determining whether the material has sufficient "serious" purpose to redeem it from the obscene category, the insularities and prejudices of even a particular state should not prevent a local resident from obtaining material deemed valuable elsewhere in America. The value and purpose of any material should, therefore, be tested against a national standard.

ARGUMENT

I

The only workable test of obscenity is that which is limited to the description or depiction of actual conduct of the kind traditionally recognized as hard core pornography.

The Amicus Curiae will not attempt to analyze extensively the meaning and legal antecedents of the three-prong test of obscenity laid down in *Miller* v. *California*, 413 U.S. 15 (1973), which doubtless will be dealt with by the parties and other amicus curiae. However, as the representatives of the distribution arm of the mass magazine and paperback industry, we wish to focus the Court's attention upon the enormous practical difficulty of applying any obscenity test which does not, at a minimum, allow a reasonable determination that certain material is not obscene by examining its content without regard to the illusive and sub-

jective concepts of prurient appeal, patent offensiveness and possibly redeeming value or serious purpose.

For nearly two decades the Court's docket has been crowded with obscenity appeals resulting in frequent reversals of state and lower federal court judgments and the expression of widely divergent views by the members of this Court on the appropriate legal test of obscenity and its application to particular materials. With some accuracy it has been said that no obscenity determination is final until affirmed by a majority of this Court. Indeed, the difficulty of drawing the line between protected material and the obscene has persuaded three members to this Court to conclude the line cannot be drawn. See dissenting opinion of Justice Brennan in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 73 (1973).

Justice Brennan's views, of course, were rejected by the *Miller* majority and Amicus Curiae is not seeking to reargue whether the First Amendment does allow censorship. However, as this Court recognized, there are "inherent dangers" in regulating expression and confined such regulation to matters "which depict or describe sexual conduct." *Miller* v. *California*, 413 U.S. 15, 24.

Despite the repeated statements of the Court that *Miller* meant to prohibit only "hard core" pornography, references in the opinions to "sex and nudity", and the inclusion of the terms "simulated" sex acts and "lewd exhibition of the genitals" in the statutory framework suggested in *Miller*, have led some, evidenced by the decision of the Georgia Supreme Court in this case, to conclude mere nudity, such as in "Carnal Knowledge" constitutes obscenity.

This interpretation has resulted in numerous threats of prosecution against retailers and wholesale distributors of such nationally known magazines as Playboy and Penthouse. In many localities the sale of these magazines has been stopped. Many retailers have requested their wholesale suppliers to cease delivering copies to them, either after informal warning by police officers or as the only way to avoid possible prosecution. Even those in the industry are not fully informed of the scope of these actions, but the instances reported by members of the Amicus Curiae indicate they are widespread and increasingly effective. Significantly, this has increased since *Miller* and before most state legislatures have even adopted the *Miller* test. And, although the principal focus of these efforts currently is upon magazines, paperback books, which also frequently deal with sexual relationships, are increasingly threatened.

The practical reality is that any definition of obscenity not limited to actual and specifically identified sexual acts can be broadly applied to any material dealing with sex and, thereby, gives rise to censorship abuses such as those noted above. Undoubtedly material that would not be deemed obscene by this Court will be considered subject to question and either deleted at the publishing level or withheld from retail sale in many communities. Only a "hard core" test will enable publishers and distributors to ascertain with reasonable certainty that at least certain material is not obscene and, thereby, enable them to resist the informal censorship which is the effective level at which the obscenity laws operate.

Of course, material falling within the description of "hard core" pornography might be saved under the other prongs of the *Miller* test, such as upon a showing of serious literary, artistic or other value. But adoption of a minimum hard core test will sharply limit non-judicial censorship by threat or that arising from uncertainty and will, in addition, effect substantial judicial economies when the great bulk of published material is removed from question.

II

The requirements of due process and the effect of self-censorship under fear of prosecution require a civil determination of obscenity prior to the commencement of criminal proceedings.

Obviously and inevitably there will remain substantial areas of uncertainty regarding particular publications, including works of fiction or educational materials dealing with sex. These areas of uncertainty raise all of the problems of coercion by local police or elected officials and the consequent self-censorship by book wholesalers and retailers described above. There is also the substantial problem of fairness and due process for booksellers, who realistically cannot and do not review the content of each magazine or paperback they sell, but who are subject to criminal prosecution and, in many states, are presumed to have knowledge of the contents of all of their publications. See e.g. *People* v. *Kirkpatrick*, 32 N.Y.2d 17, 343 N.Y.Supp. 2d 70 (1973), appeal dismissed 42 U.S.L.W. 3244 (U.S. Oct. 23, 1973), upholding such a provision under the New York State obscenity law.

In the *Miller* decision and the related cases decided last year, the Court concluded that the *Roth-Memoirs* tests were largely unworkable and sought through the revised *Miller* test "to clarify the constitutional definition of obscene material * * *." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 55. As is apparent from the conviction of Billy Jenkins, that effort failed. Any obscenity test formulated by this or any other Court cannot draw a line unambiguously distinguishing obscene from protected works in every case. Inevitably, reasonable men can and will differ in their judgments of particular magazines or books.

Consequently, borderline cases will arise and, under threat or risk of prosecution, materials that are not obscene will be denied to the reading public, either at the behest of local officials or "voluntarily" by wholesalers or retailers unwilling to risk arrest. And, to the extent such material is distributed, an entire industry will be conducted under threat of criminal prosecution with no reasonable and predictable basis for determining in advance whether its products may lawfully be sold. Indeed, in many instances the legality of particular magazines and books will vary with the standards of particular communities within the United States.

The plain fact is, whether viewed from the perspective of fairness to booksellers under our system of criminal justice, or in terms of the very real impact obscenity laws have upon the distribution of reading material and its availability to the public, the criminal law is not an effective

tool in the first instance for regulating the sale of obscene materials. The Amicus Curiae have for many years supported legislation which, in recognition of these problems, requires a prior judicial determination of obscenity in a civil proceeding analogous to a declaratory judgment. Upon such finding and notice to booksellers of such determination, continued sale of the material is then subject to criminal proceedings.

This Court itself has expressed its preference for a procedure under which a civil proceeding for determining obscenity precedes any criminal prosecution. As Chief Justice Burger observed in *Slaton*:

> "such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (413 U.S., at 55)
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> "[Such] procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty." (413 U.S., at 55 n. 4)

The Amicus Curiae believe that the requirement of a prior civil determination of obscenity permits the states to effectively control sales of unprotected material without needlessly and unjustly victimizing booksellers and motion picture exhibitors under the threat or actual imposition of criminal penalties and the severe financial burdens and unfair toll on reputation. We believe that such a civil procedure is necessary to protect against the chilling effects

of vigilante and self-censorship of controversial but constitutionally protected material.[1]

A criminal statute, in the hands of a prosecutor, acting either on his own initiative or under pressure from vocal minorities, could subject the local librarian, the man who runs the neighborhood movie theatre, the corner bookstore clerk or even the druggist who carries paperbacks in his store to the same criminal sanctions and personal humiliations as the professional pornographer. The threat of prosecution imposes an intolerable burden upon their right and responsibility to make a broad selection of constitutionally protected materials available to the public.

The alternative, if criminal proceedings remain a permitted method for testing obscenity, is that the involvement of police and other non-judicial officials condemned by this Court in *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), will continue unabated and unsupervised at the point where the most important censorship decision is made—i.e. by the wholesaler or retailer in determining what he will sell.

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1. Numerous instances have been reported to counsel for CPDA of police officers requesting retailers to discontinue handling or displaying magazines about which complaints have been made. Since the alternative is an arrest, retailers normally comply. In certain cities an understanding exists between the wholesale distributor and the local police department that questioned material will be withdrawn from sale throughout the city. This is not to suggest Gestapo tactics by the police, but rather the practical accommodation that exists and will exist under a criminal procedure and which operates totally without effective judicial supervision.

III

The scope of the community within which standards of prurience and offensiveness are determined should be national and not smaller than statewide.

In rejecting national standards for judging prurient appeal and patent offensiveness, the Court stated it was not constitutionally required that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Miller* v. *California*, 413 U.S. 15, 32 (1973). The reference to cities as well as states has given rise to speculation that any or all "local" governmental units may determine what is obscene. Although several state Supreme Courts have rejected this interpretation, in favor of statewide standards,[2] the Georgia Supreme Court in this case held that "Carnal Knowledge" was indeed to be judged by the standards of Albany, Georgia. Moreover, throughout the United States cities, towns and even villages are passing ordinances employing local standards and it has even been suggested, not necessarily facetiously, that what is lawful in Manhattan might not be in the Bronx.

The Amicus Curiae share the concern of the publishing industry generally that even the use of fifty possibly widely diverging state standards will seriously impair the ability of publishers to serve the national market for periodicals and paperback books. But difficult as it may be to work

2. See e.g., *People* v. *Heller*, —— U.S. ——, 93 S.Ct. 2789, *on remand*, —— N.Y. 2d —— (1973) and *State* v. *J-R Distributors, Inc.*, 512 P.2d 1049 (Wash., July 27, 1973).

with fifty standards, it is clearly impossible for the industry, and particularly the wholesaler members of CPDA and their retailers, who frequently distribute in more than one city or other political subdivision, to know and comply with the preferences and peculiarities of each local community that they serve.[3]

Accordingly, we urge the Court to make it clear that *Miller* meant only to reject the notion that the mores say of New York City are to be superimposed upon the entire country, and that at a minimum a statewide standard must be employed in every instance regardless of the jurisdiction in which an obscenity law is passed.

We also join others in urging the Court to reconsider its rejection of a national standard in judging prurience and offensiveness. Use of a national standard would not constitute "the absolutism of imposed uniformity", but rather the assurance that those within a state holding views common to most Americans would not be deprived of literature offensive only to a local majority. Even under such a national standard, the views of a local Sodom and Gomorrah, if such there be in this country, would not set the standard because it would not be representative of the view held by most or a majority of Americans regardless of the state in which they live.

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3. Food and drug chains typically control the purchasing activities of local stores on a regional basis. In the periodical industry this has led to the issuance of acceptable title lists by the chains' regional office, which specifies the titles wholesalers may deliver. It is likely that arrests or threats anywhere within the region will result in deletion of the questioned title from the acceptable list. As a result, local standards will have an impact far beyond the particular community setting them.

Should the Court choose to adhere to its *Miller* position and apply statewide standards, the Court should emphasize that the redemption of a particular book is based upon national standards of seriousness of purpose. It is difficult to believe that the Court intended this determination to be made on a local basis, since it is likely in practice to be coterminous with a finding by the trier of fact of prurience and patent offensiveness. Moreover, as in the instant case, the result will be that serious motion pictures, generally accepted magazines and best selling paperbacks and other books of a serious nature will surely be held unlawful in certain communities.

Such a result will truly fragment the national publishing industry and render unavailable in particular communities material conceded to have nationally accepted value. We believe this issue above all must be determined on a national basis and upon evidence of expert testimony showing the value and purpose of the work.

Conclusion

The Court's ongoing and apparently endless attempt to "solve the intractible obscenity problem,"[4] makes all too understandable the Court's laudable attempt in *Miller* to redefine obscenity in a more workable manner and to enable prosecutors to bring and win cases against the hard core pornographer. Regrettably, *Miller* has been taken by some as a signal to return to censorship not only of "hard core" materials, but also ultimately of any matter dealing

4. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J. concurring and dissenting).

frankly with sex. By failing to clarify precisely where the line between the proper and the obscene is, and by simplifying the trial procedures and by eliminating the *Memoirs* burden of proof on redeeming social value, the Court has inadvertently opened the door to prosecution and harassment of local wholesalers and retailers for selling magazines and paperbacks accepted generally within the United States.

Amicus Curiae believe that use of a strictly "hard core" test, adoption of a civil procedure complementing the innovations contained in *Miller*, and employment of at least statewide and preferably national standards for judging subject matter content, will enable the states to regulate and stamp out "hard core" pornography without impinging upon the right of Americans to otherwise read and see what they wish.

Respectfully submitted,

Newton N. Minow
One First National Plaza
Suite 4800
Chicago, Illinois 60670
(312) 329-5400

Attorney for the Amicus Curiae

Of Counsel:

Donald A. Mackay
Lee Feltman
Michael A. Bamberger